

Methodology
Logic and Program Flow for
FLSA Overtime Module of the Occupational Assessor,
also known as PAQ's enhanced Dictionary of Occupational Titles® (eDOT)
and
PAQ's online scored PAQ_f, Position Analysis Questionnaire (FLSA version)
as found at www.paq.com
Per Rules and Regulations

***PART 541--DEFINES AND DELIMITS THE EXEMPTIONS FOR EXECUTIVE,
ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES***
[Federal Register: April 23, 2004] (Volume 69, Number 79)

Introduction – Overtime Protection

The Federal Government has a unique way of looking at positions to determine if they should receive overtime pay. Most Americans think of jobs in terms of whether they are paid on an *hourly* or a *salaried* basis. In this regard, *hourly* workers are "on the clock" and must either record their actual hours worked each week or punch in and out utilizing a time clock; such *hourly* workers are generally paid "overtime" which is calculated as time and one-half straight time for any hours worked in excess of 40 hours in their work week (this may vary as dictated by state laws). *Salaried* workers, on the other hand, are paid a flat rate for a work period (weekly, bi-weekly, monthly, etc.) regardless of the actual number of hours worked. Despite this misconception, the Wage-Hour Division of the US Department of Labor does not use the "*salaried*" definition in determining overtime treatment. Rather, overtime treatment is determined based on an analysis of "nature of duties", as well as an earnings test (generally \$455/week), to arrive at one of two classifications: *exempt* or *nonexempt*. These classifications do not apply to job families (e.g., clerk) because each position is unique in the duties required and warrants its own classification based on these duties.

The Fair Labor Standards Act of 1932, now amended, requires *all positions* to be paid overtime for all hours actually worked over 40 in a week (again, this may vary by state regulations), UNLESS those jobs meet specific detailed tests that will qualify them as EXEMPT from that law. As of August 23, 2004 these tests have changed. The Federal Register forecasted (or estimated) that 6.7 million jobs (out of 137 million), or 5% of all jobs, gained new overtime protections as of August 23, 2004. For the most part, these jobs will have changed status because of the "nature of duties" tests.

Job Analysis and the FLSA

The August 2004 tests require the identification of a position's "primary duty". For a position to be "exempt" under the FLSA, it must pass all 3 of the following tests (although some exceptions are dictated):

1. Salary Level Test (minimum of \$455 per week)
2. Salary Basis Test (method of payment)
3. Duties Test

Generally it is recommended that organizations document positions via a position description including a brief outline of the position's primary duty as well as details about the position's top four to five primary tasks. There are arguments to not write or store job descriptions, but if a set of defensive records is to exist (in order to mitigate or eliminate penalties and interest with evidence of good-faith attempts at FLSA compliance), documentation appears to be needed.

Many job analyses questions are needed to address the new changes: required education (advanced knowledge "*customarily*" acquired by a prolonged course of specialized intellectual instruction), number of employees supervised, outside sales, creativity, innovation, judgment, exercise of discretion, etc. In short, compliance with this Act might be greatly enhanced by using eDOT to create a brief position description,

beginning with an action verb and a set of updated selected characteristics of occupations (SCOs) or work measures reflecting “customary” (which we define as industry norms) measures for like jobs. Knowledge of typical SCO measures (derived from the over 100,000 eDOT Skills Project and PAQ subject matter expert field job analyses) should make updating position descriptions for these assessments quicker and easier.

The new FLSA regulations utilize not only the construct of the *Dictionary of Occupational Titles* (DOT) and the enhanced Dictionary of Occupational Titles (eDOT), but also the language. Subpart H, 541.701, for example, states: “The phrase ‘customarily and regularly’ means a frequency that must be greater than occasional but which, of course, may be less than constant.”

In the mid 1990s, the US abandoned the DOT in favor of O*NET. However, this definition or measurement of “customarily” is not part of O*NET, thus, there is an obvious need for continued use of the DOT. For this methodology, eDOT/PAQ utilize the DOT’s “Occasionally” measure (up to 1/3 the time) for evidence of existence of a trait and “Frequently” (1/3 to 2/3 of the time) for “customary duties,” as are required by the FLSA regulations. As a result, according to the eDOT methodology, *customarily* means a frequency greater than 1/3 of the time.

In addition to these measurement issues, the work measure databases of O*NET are currently populated solely by analyses done by job incumbents. While the eDOT Skills Project has some incumbent-supplied data via web responses to 3 rotating questions obtained from 99 work characteristic measures, the majority of input is from trained job analysts and does not use employees’ input as a final judgment in the measurement scale ratings. This is particularly significant for overtime analyses, where the use of incumbent decisions for exemption determination puts an organization at high risk for litigation. Many incumbents want to be exempt as a status measure, while others may wish higher earnings and welcome a nonexempt designation when these overtime funds could be saved. In most cases, practice finds job incumbents tend to rate their positions’ responsibility, authority, and discretion higher than would trained job analysts.

Overtime audits and litigation could quickly put millions of employer dollars at risk. Employees are not held accountable for compliance; it is the employer who defends and pays. It is the employer who makes the exempt/nonexempt determination. Job analysis and exemption determination are not matters for untrained analysts or those who have no knowledge of “customary” measures, industry norms or job analyses definitions.

Summary

Determinations of positions’ exempt status are not easily made. They require knowledge of what the “primary duty” of a position is, the educational levels required (for the “learned” exemption), and determinations of such measures as “independent judgment,” “exercise of discretion,” and other work characteristics. In the end, a decision must be made up or down, “exempt” or “nonexempt”.

We will discuss exemption determination step by step. Neither this discussion, the FLSA Overtime module of the enhanced Dictionary of Occupational Titles, or PAQ online scoring should be relied upon as an official reference for understanding and implementing the changes to the FLSA regulations. The US Department of Labor (DOL) is the authority on 29 CFR 541. It can be accessed via the DOL’s FairPay Web site at www.dol.gov/fairpay.

Step 1

Exemption analyses begin by assuming a nonexempt classification. Among the exempt classifications there exist 5 categories: Executive, Administrative, Professional, Computer Employee and Outside Sales, along with preamble definitions of blue collar/manual labor and certain predefined “first call” and other jobs that are, by definition, nonexempt. In all, there are 6 divisions (5 exempt and 1 nonexempt) with special treatment of certain professions (teachers, creative or learned professionals, teachers or legal or medical professionals), industries and geographic areas.

The initial task is to assign a position to one of the 5 exempt categories. (Note: Positions may be exempt

in more than one category.) Underlying these categorizations is Sec. 541.2 stating, "Job titles are insufficient" for establishing exemption:

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the Regulations.

However, this does not appear in these new regulations to preclude establishing nonexempt status by job title. Any reader of the Act comes across hundreds of examples in the text that specifically state that certain jobs are nonexempt regardless of any other input. For example, new section 541.3(b) states that "the exemptions do not apply to police officers, fire fighters, paramedics, etc."

The methodology described herein solves this issue by assuming that all positions are nonexempt from the FLSA unless proven to be exempt. eDOT and PAQ scoring utilize the PAQf (complete form) job analysis input sheet, which may be an extract of the complete PAQc (complete form) questionnaire. There are no extraneous questions; all must be addressed including the determination of the primary duty, closest eDOT job match (for an assessment of "customary" measures) and determination of the skills applied (initiated with a skill verb). Also requiring input are "comment" fields where analysts record examples that justify their ratings.

A word on analysts' comments: The designers of eDOT have, on average, 30 years of Human Resources experience, including great appreciation of the Solicitor General's office and FLSA compliance audits. PAQ has been supplying FLSA predictions in its Job Evaluation Reports since 1974. All attest to the most common challenge facing an employer in an audit, the propensity for analysts, who often make hundreds of these analyses a year, to forget why a certain determination was made. Logged comments as to observations can "save the day" when an audit is forthcoming.

Analysts' comments, eDOT customary industry norm predictions, and the appropriate documentation are the foundation for defensible compliance.

Step 2

The second task is to define the geographic area and industry in which the position exists (as variances are allowed by state/territory and industry).

Examples include:

- American Samoa (where the \$455 per week threshold is \$380)
- The motion picture industry (where the base rate is \$695 per week and the "requirement that the employee be paid 'on a salary basis' does not apply.") (541.709)

Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Kentucky, New Jersey, North Dakota, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin have their own regulations that may be more strict than the Federal Regulations. Additionally, a host of industries have some special treatment under the Federal Rules.

In order to properly utilize eDOT and an online scored PAQ analysis for exemption determinations, both Industry and Geographic Area must be specified. eDOT subscribers who use the default "All Industry" and "US National" definitions may see this message:

Please change the US City Area and NAICS Industry in the Data that Affect Career Assessments box at the bottom of the screen.

Again, these data points are not extraneous to the FLSA analyses.

Step 3

Step 3 consists of two of the three tests: compensation level and manner in which paid. Most exemption categories have a default minimum salary of \$455/week, however, certain categories do not. Both a

“salaried” (method of payment) and “amount” test must be met to go forward. The latter requires individuals in certain categories be paid on a non-hourly basis. For example, if a Registered Nurse is paid hourly, it typically assures that this otherwise exempt position must be treated as a nonexempt. Contrarily, specific exemptions exist for those in the motion picture industry (as previously discussed), computer employees compensated on an hourly basis at a rate not less than \$27.63 per hour, etc.

A “Highly Compensated Employee” is one that receives total compensation of equal to or greater than \$100,000 (base salary plus bonuses but not the value of benefits). The employee must “customarily and regularly” perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee (primary duties).

Step 4

As described, there exist 5 categories of exemption: Executive, Administrative, Professional, Computer Employee and Outside Sales. For PAQ/eDOT predictions, Professional is divided into Learned, Creative, Teacher, Law and Medical sub-categories. Each of the categories has its own ambiguities, various job analysis measure criteria (education, independent judgment, exercise discretion, etc. that relate to PAQ/eDOT job analyses measures) and methodology. Determinations include defined names of skills (gerund/verbs that define the category fit) and certain prenamed job types (families or sub-families) that have special treatment under the regulations.

For most jobs, assignment to a category and determination of exempt status is simple and straightforward. The economic discussions regarding the new Regulations state that 6.7 million American workers had their status “strengthened” as of August 23, 2004. It is these workers' jobs, representing 5% of all employed positions in America, where “grey areas” exist. Back pay, penalties, interest and litigation shadow these “grey area” jobs.

PAQ/eDOT exemption determinations computations start with the Regulation's Preamble, which lists occupations by title where the exemption regulations do not apply. Specifically listed are “first responders” such as: ambulance worker, correctional officer, deputy sheriff, detective, emergency medical technician, fire fighter, hazardous materials worker, highway patrol officer, investigator, paramedic, park ranger, parole officer, plumber, police officer, probation officer, rescue worker, and state trooper.

Other workers who do not qualify for exemption are called “blue-collar” workers and described as an employee performing “work involving repetitive operations with their hands, physical skill and energy”. Examples of this category include: carpenter, construction worker, craftsman, electrician, inspector, iron worker, laborer, longshoreman, maintenance mechanic, manual laborer, mechanic, operating engineer, operator, plumber, and production-line jobs.

In addition to blue collar nonexemptions, the following skill verbs are defined as nonexempt (skill verbs or gerunds):

- apprehends
- conducts
- controls
- detains
- detects
- extinguishes
- fights
- fingerprints
- handles
- inspects
- interviews
- interrogates
- investigates
- performs
- prepares

- prevents
- pursues
- repeats
- rescues
- restrains
- works

In contrast to the blue collar nonexemptions, the Regulations list the following as exempt by definition (also later test categories):

- archeologist
- architect
- computer programmer
- medical doctor

The Regulations then describe the tests for Executive, Administrative, Professional, Computer Employee and Outside Sales exemptions. As mentioned, the first three of these have a \$100,000 and above automatic exemption.

Tests for Executive Employees:

The primary duty is management of the enterprise or of a “customarily” recognized department or subdivision with permanent status (in which employed). “Manages” is a key skill verb, although other verbs can give evidence (“directs,” “controls,” etc.).

Other key questions are:

- How often does the position **customarily** and regularly direct the work of at least two or more other employees (or their equivalent)?
- Are this job incumbent's suggestions given particular weight relating to hires, fires, advancement, promotion or any other change of status of other employees?

Again certain examples are given:

Nonexempt by definition includes:

- Assistant Supervisor
- Relief Supervisor
- Working Supervisor

Nonexempt skills defined include (skill verbs or gerunds):

- Handles
- Performs
- Repeats
- Works

Exempt by definition includes:

- Assistant Manager
- Benefits Manager
- Business Owner
- Labor Relations Manager
- Pensions Manager
- Personnel Manager

- Retail Assistant Manager
- Trainee

Exempt skills defined include (skill verbs or gerunds):

Adjusts	Apportions
Appraises	Controls
Determines	Directs
Disciplines	Employs
Handles	Interviews
Maintains	Manages
Monitors	Plans
Provides	Recommends
Selects	Sets
Trains	

Tests for Administrative Employees:

The Primary Duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Also, the exercise of discretion and independent judgment must be shown, as it must be an individual "whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."

Nonexempt by definition includes:

Building Specialist	Clerk
Comparison Shopper	Construction Specialist
Dietitian	Environmental Specialist
Examiner	Fire Prevention Specialist
Grader	Health Specialist
Inspector	Investigator
Lunchroom Manager	Messenger
Personnel Clerk	Psychologist
Safety Specialist	Sanitation Specialist
Secretary	Soils Specialist

Nonexempt skills defined include (skill verbs or gerunds):

Carries	Grades
Inspects	Operates
Performs	Prepares
Records	Repeats
Screens	Sells
Services	Tabulates

Exempt skills defined include (skill verbs or gerunds):

Administers	Analyzes
Arbitrates	Assists
Audits	Binds
Budgets	Carries
Collects	Commits
Compares	Consults
Designs	Determines
Deviates	Disputes
Establishes	Evaluates

Exercises	Finances
Formulates	Handles
Implements	Insures
Interviews	Interprets
Investigates	Judges
Maintains	Makes
Markets	Measures
Negotiates	Performs
Plans	Promotes
Provides	Purchases
Recommends	Represents
Resolves	Reviews
Runs	Studies
Taxes	Tests
Waives	

Tests for Professional Employees:

Learned - Professional

The Primary duty includes the performance of work requiring advanced knowledge, in a field of science or learning “customarily” acquired by prolonged course of specialized intellection instruction. The duty test is threefold: work requires advanced knowledge, knowledge must be in science or learning, and “customarily” acquired by a prolonged course of specialized intellectual instruction. This prolonged course is restricted to professions where advanced training is a standard prerequisite for entrance into the profession.

Examples of professions include: law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations.

Creative - Professional

This exemption category requires that the primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Nonexempt by definition include:

- Animator
- Cartoon Artist
- Journalist
- Retoucher
- Reporter

Nonexempt skills defined include (skill verbs or gerunds):

- Performs

Exempt by definition include:

- Actor
- Composer
- Conductor
- Creative Cartoonist
- Essayist
- Graphic Artist
- Inventor
- Musician

Novelist
Painter
Screenplay Writer
Short-Story Writer
Soloist
Writer

Exempt skills defined include (skill verbs or gerunds):

Acts
Analyzes
Comments
Conducts
Interprets
Interviews
Investigates
Performs
Writes

Teacher - Professional

This exemption category requires the primary duty of: teaches tutors, instructs or lectures in the activity of imparting knowledge. It also requires the job incumbent to be employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. A four-year college education or equivalent is required.

Exempt by definition includes:

Academic Advisor
Aircraft Flight Instructor
Automobile Driving Teacher
Coach
Home Economics Teacher
Instructor
Gifted or Disabled Teacher
Kindergarten Teacher
Moderator
Nursery School Teacher
Teacher
Vocal or Instrumental Music Instructor

Exempt skills defined include (skill verbs or gerunds):

Advises
Coaches
Instructs
Lectures
Moderates
Teaches
Tutors

Law or Medicine - Professional

This exemption category is a learned professional category where “employed in a bona fide professional capacity” includes holders of a valid license or certificate permitting the practice of law or medicine or those in medicine in an intern or resident program.

Exempt by definition includes:

Attorney
Counsel
Dentist
Doctor of Dental Medicine
Doctor of Optometry
Doctor of Osteopathy
General Practitioner
Intern
Lawyer
Medical Doctor
Optometrist
Podiatrist
Osteopathic Physician
Physician
Specialist

Tests for Computer Employees:

The new Regulations add a new category of exemption, including job families of computer systems analysts, programmers, operating systems software engineers, etc. Any of three duty definitions avail a position of exemption: 1) application of systems analysis techniques and procedures, including consulting; 2) design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or 3) design, documentation, testing, creation or modification of programs related to operating systems. "Because job titles vary widely and change quickly in the computer industry, job titles are not determinative." (541.400)

Nonexempt by definition includes:

Computer Manufacturing Laborer
Computer Repairer
Trainee

Nonexempt skills defined include (skill verbs or gerunds):

Manufactures
Repairs
Uses

Exempt by definition includes:

Computer Programmer
Systems Analyst

Exempt skills defined include (skill verbs or gerunds):

Analyzes
Applies
Creates
Consults
Designs
Developments
Documents
Modifies
Programs
Tests

Tests for Outside Sales Employees:

The Regulations contain an old category (without a test for time after 8/23/04). It includes those whose primary duty is making sales, obtaining orders or contracts for services, for the use of facilities (for which consideration is paid) outside the *customary and regular* place of business.

Nonexempt by definition includes:

- Delivery Driver
- Driver
- Route Driver

Nonexempt skills defined include (skill verbs or gerunds):

- Arranges
- Delivers
- Promotes

Exempt by definition includes:

- Manufacturers Representative
- Outside Salesperson

Exempt skills defined include (skill verbs or gerunds):

- Consigns
- Obtains
- Sells

The FLSA used to require that salespeople spend less than 20% of their time on non-sales work. The new FLSA regulations eliminate this 20% threshold, as it was difficult to calculate and courts ignored it when making decisions regarding sales employees' exempt status.

Note: The information above has been taken from 29 CFR Part 541 found at www.dol.gov/FairPay.

Exceptions

Through the years, a series of industries and occupations have gained special treatment that affect overtime treatment. The new Act specifically gives new rights to American Samoa and the Motion Picture industry. Other long-standing exemptions to the Fair Labor Standards Act include:

By Industry

- Air Carriers
- Amusement Parks Seasonal
- Commodities Bulk Petroleum Distribution
- Employers subject to the Interstate Commerce Act
- Farms, Including Tobacco
- Fishing and Operations on Aquatic Products Vessels
- Forestry or Logging Operations – less than nine employees
- Motion Picture Theaters
- Motor Carriers
- Newspapers - small
- Railroads
- Telephone Organizations – small

By Specific Jobs

Caretakers to Infirm
Casual Babysitters
Companions to Elderly
Delivery Employees on Approved Trip Rate Plans
Domestic Service Workers Residing in Their Employer's Home
Farm Workers
Fishermen
Seamen
Switchboard Operators
Taxicab operators

By Job within an Industry

Broadcasting Stations Announcers, News Editors and Chief Engineers
Commissioned Workers of Retail Auto, Truck, Trailer, Farm Implements, Boat or Aircraft Sales
Mechanics in Auto, Truck or Farm Implement Retail Firm
Parts-Clerks in Auto, Truck or Farm Implement Retail Firm
Ministerial Within a Religious Organization
Sales Workers in Auto, Truck or Farm Implement Retail Firms

Highly Compensated

An employee with total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.

Inputted Compensation

Various other exceptions exist. For computer employees the compensation requirement may be met by compensation on an hourly basis at a rate of not less than \$27.63 (Sec 541.600(d)). In the case of medical occupations, an exception exists except the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession. (541.600(e)). In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed (Sec 541.600(c)). eDOT defines these variances by the SOC code of the selected eDOT position (>150000 and < 151082, >=291060 and < 291070, and >=251000 and < 254000 respectively). The ability to enter one's own threshold salary also exists, as the latter exceptions (rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed) will be a unique variable for each and every subscriber/user. Because of this, for SOC codes 211012, 211022, 259031, 259041 and 259199 and for any designation of SIC industry in the 82xx series, the Threshold Value is blank (0.00).

For Your Knowledge

Any employee or former employee may file a complaint with the DOL's Wage and Hour Division claiming that his/her employer failed to meet its obligations under the FLSA. The DOL has the authority to investigate and make a ruling, and if it determines that the employer owes the employee back wages, it may enforce the ruling by a variety of methods:

- conciliation - if the DOL can persuade an employer to cooperate, it may supervise a settlement of the claim between the employee and employer, in which case the employer may

be able to escape with only liability for back pay - Section 216(c);

- civil action for back pay and damages - the DOL may sue on an employee's behalf to recover back wages and liquidated damages - Section 216(c);
- injunction - the DOL may apply for an injunction to restrain further violations by the employer or to restrain the sale or transfer of goods produced with labor that was compensated in a way that violated the FLSA - Section 217);
- criminal action - under 29 U.S.C. 216(a), the US Department of Justice may bring a criminal action against an employer in the case of a willful violation of the FLSA; and
- civil actions by employees - employees have the right to file suit in a court of competent jurisdiction to protect their rights under the FLSA - 29 U.S.C. 216(c).

If the DOL determines that there is no merit to the employee's claim, it will issue a "right to sue" letter under 29 U.S.C. 216(b) (a "216(b) letter") notifying the employee of his or her right under that provision to file a civil action in court to recover any amounts that might be due. As a practical matter of enforcement, due to limitations on agency resources, DOL will often issue "216(b) letters" even to those wage claimants who have valid FLSA complaints. The Wage and Hour Division of the US Department of Labor enforcement was not modest in 2003. In that fiscal year, the Agency collected over \$212,537,554 in back wages.

Computations

PAQ online scores for exemption prediction (in use since 1974 by PAQ clients) and those estimations derived from the enhanced Dictionary of Occupational Titles both utilize initial values for "customary" displays of SCOs. These values are taken from the eDOT Skills Project Raw Data site, a constantly updating database for job analysts' input. Specific measure scores are computed in several manners: 1) SME job analyses input only, 2) partial analysis input (from experimental sources such as the Internet) and 3) a combination of the two (representing over 20 different potential data contributor types). Averages are displayed along with a calculated standard deviation for the measures.

Daubert Challenges: Statistics and Construct

In 1975, the US Congress passed Federal Rule of Evidence 702 so that a threshold standard for the admission of expert witness testimony might exist in Federal Courts. Based on the concept that experts should use methodologies that are "generally accepted" by a discipline's practitioners, the rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Following this, the Supreme Court issued an opinion in *Daubert v. Merrill-Dow Pharmaceuticals*, 509 US 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) that has become the standard for the admission of "general acceptance". In this Case (which standard is now adopted by Federal and most State Courts), the admittance of expert witness testimony and evidence required a two-step analysis: A) evidence must be relevant, and B) evidence must be reliable. The "relevance" is a subjective judgment but simple logic may be applied (salary survey data for use in lost wage analyses, proxy compensation data for use in maximum reasonable compensation cases, etc.).

For the latter, "reliability", the Supreme Court established four separate, non-exclusive tests: 1) it can be illustrated that the theory or technique can be tested, 2) the data has been subjected to peer review and publication, 3) there is a known or potential rate of error, and (4) there is a level of general acceptance in that particular discipline's community.

In March of 1999 the United States Supreme Court issued a ruling in the *Carmichael vs. Kumho Tire Co.* case that further defined when a Daubert reliability challenge applies. In *Carmichael*, the Supreme Court ruled that reliability must be established in all types of expert testimony, both scientific and non-scientific/non-technical. The Court held that the role of a trial judge was that of "gatekeeper" regarding both the relevance and reliability of all expert testimony. The Court stated that the Daubert case was not intended to be limited to scientific cases only. Instead, it would/should apply to all fields of expert testimony. Providers of expert witness testimony must be prepared to describe why an analysis was utilized and why the analysis and data can be considered reliably sufficient.

The following description of "Computations" is presented so that computations can be tested. There is also a description of "rate of error."

Comparable values for the various job analyses measures (reflecting industry practice) for the measures described (education, independent judgment, etc.) are presented in the enhanced Dictionary of Occupational Titles (and its brief version, the PAQ revised Dictionary of Occupational Titles) with an accompanying Standard Deviation. These collected standard deviations, along with the closeness of the match (skill verbs) entered for the Primary Duty and Other Duties, are converted in this report to a single Estimate of Reliability (see the eDOT Methodology). Simply stated, PAQ online scores and eDOT's FLSA estimates are presented as "predictions" and "estimations" with an expressed rate of error.

That said, this is a computer program with a set program methodology. The new Regulations 29 CFR 541 caution that each specific position requires a specific review, not all of which can be quantified. PAQ Services, Inc. cautions that there is a wide range of issues related to overtime determinations, not all of which can be addressed by a computer program. Errors in estimates will exist. Both PAQ and ERI Economic Research Institute (which originally designed the eDOT Skills Project) are not engaged directly or by implication in rendering legal, accounting or other related professional services. Where uncertainty exists, it is recommended that competent wage and hour legal counsel be sought.

Computation Terminology

The PAQ/FLSA Input Questionnaire (**FLSA Analysis** tab) includes the following variables:

Organization Name

The full company or organization name – typically the employer of the individual/position being analyzed.

Position Title

Enter the position title of the employee being analyzed. (The actual position title is not necessarily the eDOT position title selected on the Job tab).

eDOT Job Title

Read only. This is the job title selected on the Job tab.

Position Description

The position description for the eDOT position selected. This prose is shown to assist the field job analyst's confidency matching decision.

Confidency eDOT Match

The user is asked to answer the question: "Does the specific position description for the job being analyzed match the general job description found in eDOT's database?"

Populate with PAQ Norms

Set to "No" by default. By selecting "Yes" to override "Not Present" values and/or "Default Minimums", the questions that are most relevant to the selected job will be automatically populated. (Example: For Chemical Engineer, Advanced Knowledge is set to "Occasionally". Chemical Engineer is categorized as "Professional", and the Professional test for exemption requires that Advanced Knowledge be something other than "Not Present".)

Primary Duty

As of August 2004, determination of a position's exempt status requires the identification of the position's "primary duty". By default, the Primary Duty is completed based on the eDOT position selected. However, the analyst may select a different action word to one that better matches a specific exemption category for the position being analyzed.

Other Duties

Several of the exemptions (like Computer Employee) call for the matching or review of multiple duties. By default, the Other Duties fields are filled using "enhanced Skills" for the eDOT position selected. The analyst may modify the action words selected to those that better match a specific exemption category.

PAQ Questions Specific to FLSA Job Analysis

Nine questions. If the value for a question is set to anything other than "Not Present" and/or modified from the default, then the corresponding comment field must also be filled out. See notes for the "Populate FLSA Job Analysis Fields with PAQ Norms" field.

Salary/Wage/Commissions

Enter the appropriate US\$ value. This field works in conjunction with the pay period selected.

Period

Select the appropriate pay period. This field works in conjunction with the salary or wage.

Weekly Threshold Value

Read only. The salary value threshold varies by category. This field is enabled when an industry is selected having an SIC code that begins with 82 ("Educational Services"), and/or when a job is selected having one of the following five (5) SOC codes: 211012, 211022, 259031, 259041 or 259199 (positions related to the field of education). Please note: This field does *not* reflect changes to the threshold associated with geographic area (i.e., areas that have a different threshold than the federal government's \$455/week earnings test). On the Analysis Report tab, please refer to the "Passing Tests for:" field in the summary table at top and/or the Step 3 section which includes information on pertinent thresholds for the given analysis, if any.

Analyst's Name

The full names of all analysts involved with the creation of this FLSA Analysis.

Single/Group Analysis

PAQ has been collecting this information since 1972 (whether job analyses were the product of one analyst, or a combination of two or more job analysts). Select Single or Multiple to indicate what type of analysis is being reported.

The **Analysis Report** tab's screen contains the following:

State OT

The State Overtime (also referencing territories or Washington, D.C.) prediction confidence level will range upwards to 98% as displayed directly below the study of duties (exempt vs. nonexempt). This score represents the highest level of confidence estimated (note that professional exemption tests, in particular, differ because of varying court interpretations and range between 43% and 73%). Conflicting federal and state results may exist in 10 states. If there is a conflict, nonexempt status typically prevails (that most favorable to the employee).

Several states are very unique in their exemption tests (e.g., California) while others use the pre-2004 FLSA short and long test approaches (e.g., New Jersey, Connecticut, etc.). All states vary a bit. For example, New Jersey uses "nonexempt duties," while other states define exempt duties by the test (i.e., executive, administrative, etc.).

US FLSA Probability

The US FLSA Probability score is a numerical value ranging from 2% to 98%. This is a prediction of what a court, the final arbiter, might determine. ERI Economic Research Institute, Inc. (software and salary database provider) and PAQ Services, Inc. (eDOT job measure database provider) caution that there are a wide range of issues related to overtime determinations, not all of which can be programmed. ERI provides a probability statistic that profiles an "Exempt" prediction if greater than 50%. The score displayed in the summary form at the top of the screen (the score below the "US FLSA Probability" score) typically represents the "highest" score from each of the six test categories.

Power Ratio

This score works like the Probability Score for the integer, and may go as high as the integer three, acting as a non-determinative score. Any decimal close to .00 illustrates weakness, while values close to .98 show strength. This score is the sum of the values listed in the Power Ratio column for the Initial, Step 1, and Step 2 tests. A Power Ratio of 0.98, for example, represents a sum of data including: 1) like jobs (0.44) studied since 200; 2) for the job family (0.18) matching; 3) for the primary duty's work field (0.28) match; and for "other duties" (0.08). A Power Ratio of less than 0.30 warrants a second review; less than 0.10 merits a third. The latter would suggest that no like finding by primary duty, like job title, or job family collection had a similar result.

Remaining

These entries should be self-explanatory. The salary value threshold, against which a test shall be measured, can vary by industry or geographic area. Depending on the industry and state selected, each of the categories would have a separate threshold. Various percentages are illustrated, including "exempt" duties in aggregate, a combination used in the US FLSA maximum threshold determination.

Occasional Tasks

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors would be considered in determining whether such work is exempt work: whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; **whether the exempt employee performs the task frequently or occasionally**; and existence of an industry practice for the exempt employee to perform the task (Sec 541.707).

Customarily and Regularly

The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks. (Sec 541.701). These terms, of course, are eDOT terms used by the DOT since 1939. If customarily and regularly is not used in the new Regs concerning a job analysis measure, PAQ assumes that reference to the presence of a measure means that the value should be greater than "Not Present." If the term "customarily and regularly" is used, it is assumed that the DOT frequency measure of greater than one-third of the time is to be used (previously defined as "Frequently" in the Occasional, Frequent, Constant scale).

An in-depth Discussion of "Customarily and Regularly"

Many experts may opine as to the simplicity of this new set of Regulations, but others will begin

with the section (541.2) "Job titles insufficient." *A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations.*

The "meeting of duties" relies upon a definition found throughout 541 of "customarily and regularly." As described in section (541.701): *The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.* The April 23, 2004 Federal Register discussion of this definition defends its use based on long-time acceptance and use by practitioners and the courts (left unsaid is that "occasional" and "constant" are terms of the abandoned US DOT).

As important, PAQ must assume that when this term is not used, its absence incorporates a duties claim to use of "Present" in the eDOT construct, particularly if what is in question is a "primary duty." PAQ assumes that if the Regulations wished an application frequency of greater than 1/3 the time, the term "currently and regularly" would have been used as it is in the other sections. Thus to pass a test in PAQ's FLSA Overtime module of eDOT, should a primary duty exist (here we assume the DOT's construct that "isolated and one-time tasks" are never to be included in a description or collection of a primary duty), an analyst's score of anything in excess of "Not Present" will suffice for passage. Should "customarily and regularly" be found in the Regulation, a score in excess of "Occasionally" will be used (which is greater than 1/3 the time in the eDOT/DOT construct).

For reference purposes.

Subpart B

Executive Employees – Note the 3 tests require an "and" combination (all must be present). *Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and (3) who **customarily and regularly** directs the work of two or more other employees; and (4) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.* Note that the term "customarily and regularly" applies only to the direct supervision of two or more employees. The latter "hire or fire" counsel contains only the mention of its existence and not frequency. In this case, any condition identified greater than "Not Present" would suffice to pass this latter test, but not the #3 test as the former (direct supervision) requires a "greater than 1/3 the time" analysis.

However, in the section (541.105) that discusses "Particular weight" *To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is **part** of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive **customarily and regularly** directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. (Consequently, eDOT's FLSA Overtime module combines the asking of its supervisory question with the number of employees supervised; i.e., both must be affirmative and assumes a condition of greater than Occasional is needed for passage.)*

Subpart C

Administrative Employees

The definition that a primary duty is *the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's*

customers; and where that primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. (Sec 541.200). It does not include the term "currently and regularly" in its definition. Consequently, PAQ's passage tests are limited to those responses in excess of "Not Present" with both the Administrative and Discretion job analyses questions answered in the affirmative.

Subpart D

Professional Employees

Divided into four groupings (Learned, Creative, Teaching, and Medicine & Law) the job analyses categories are built around educational level. No mention of the frequency of application of professional skills is made. For example, for Creative Professionals: *To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work.* (Sec 541.302). Consequently, just the existence of this requirement suffices for testing purposes (PAQ assumes that if the Regulations wished an application frequency of greater than 1/3 the time, the term "currently and regularly" would have been used as it is in the other Sections). Note: the equivalent to 4- year college degree is not required for this latter professional sub-category.

Subpart E

Computer Employees

Applies only to computer employees *whose primary duty consists of: (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.*

(PAQ does not read any use of the term "customarily and regularly." If any of the above exists as a primary duty at any frequency level, an exemption determination shall exist.)

Subpart F

Outside Sales Employees

*Making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and who is **customarily and regularly** engaged away from the employer's place or places of business in performing such primary duty.* eDOT's FLSA Overtime module again requires a condition of "greater than occasional" for passage.

Disclaimer

PAQ Services, Inc. and ERI Economic Research Institute caution that there is a wide range of issues related to overtime determinations, not all of which can be programmed. Errors in estimates will exist and USERS SHOULD (1) USE THIS FLSA OVERTIME MODULE OF THE ENHANCED DICTIONARY OF OCCUPATIONAL TITLES ONLY AS A STARTING POINT FOR THEIR DECISION-MAKING, (2) APPLY INDEPENDENT JUDGMENT AND RESEARCH, (3) INDEPENDENTLY ASSESS THE RELIABILITY AND ACCURACY OF THE eDOT DATA AND REPORTS AND (4) UNDERSTAND AND REVIEW THE eDOT METHODOLOGY.

eDOT is intended for use only by trained job analysts.

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This FLSA Overtime module of the enhanced Dictionary of Occupational Titles should not be relied upon as an official reference for understanding and implementing the changes to the FLSA regulations. The US Department of Labor (DOL) is the authority on 29 CFR 541. One can access the DOL's FairPay Web site through Issue Tracker – Overtime Regulations or at www.dol.gov/fairpay. This FLSA Overtime module does not contain State or other local calculations; it profiles only US Government regulations.

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Patent Nos. 6,862,596 and 7,647,322, other Patents Pending

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